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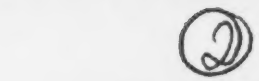

No. 07-1003

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

SLEEPER FARMS, VAUGHN SLEEPER AND MARY SLEEPER,

Petitioners,

v.

AGWAY, INC., RICHARD SIROIS, TODD BRADLEY AND CARL SMITH,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. In the event of an alleged "default" under an arbitration provision, does a court or an arbitrator decide whether the party allegedly "in default" of the arbitration clause may compel arbitration?

2. May a party allegedly "in default" of an arbitration clause compel arbitration?

PARTIES TO THE PROCEEDING

The following plaintiffs, Petitioners herein, asserted claims in the trial court:

Sleeper Farms
Vaughn Sleeper
Mary Sleeper

The following parties were defendants, Respondents herein, in the trial court[1]:

Agway, Inc.
Richard Sirois
Todd Bradley
Carl Smith

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, the Respondent Agway, Inc., affirms that it has no parent company and there is no publicly held company owning ten (10) percent or more of its stock.

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[1] Kenneth Wiles and Dennis LaHood were originally named as defendants but the causes of action against them were dismissed by consent of the plaintiffs.

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Respondents respectfully submit this Brief in Opposition to the Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The November 2, 2007 opinion of the First Circuit is reported at 506 F.3d 98 (1st Cir. 2007) and reprinted as Petitioners' App. 1. The November 1, 2006 opinion of the District Court is reported at 460 F. Supp. 2d 184 (D. Me. 2007) and reprinted as Petitioners' App. 28. The July 1, 2002 decision of the District Court is reported at 211 F. Supp. 2d 197 and reprinted as Petitioners' App. 13. The Petitioners fail to reference the December 16, 2005 Award of Arbitrator.

JURISDICTION

Unless this Court determines that the Petition has been rendered moot for the reasons described in Point 6 below, the Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

INTRODUCTION

Sleeper Farms, Vaughn Sleeper and Mary Sleeper (collectively referred to as the "Petitioners" or the "Sleepers") filed a Petition for Writ of Certiorari dated January 30, 2007 to review the decision of United States Court of Appeals for the First Circuit dated November 2, 2007. Agway, Inc., by D. Clark Ogle, Trustee of the Agway Liquidating Trust, Richard Sirois, Todd Bradley and Carl Smith (collectively referred to as the

"Respondents" or "Agway") respectfully submit this Brief in Opposition to the Petition for Writ of Certiorari.

The Sleepers seek review of the First Circuit's decision which rejected the Sleepers' challenge to the District Court of Maine's (the "District Court") decisions: (i) initially referring the dispute to arbitration in 2002 and (ii) confirming the decision of the arbitrator in 2006 (the "Arbitration Award").

PROCEDURAL BACKGROUND

The Arbitration Award granted the Sleepers $82,459.19 in contract damages and $20,040.51 in reimbursement of arbitration fees, for a total award of $102,499.70.

According to the Arbitration Award, the American Arbitration Association ("AAA") recorded Agway's demand for arbitration as having been filed on February 1, 2002. On February 25, 2002, the Sleepers filed their complaint in District Court against Agway, Richard Sirois, Todd Bradley, Carl Smith, Kenneth Wiles and Dennis LaHood. By stipulation, Wiles and LaHood were dismissed in July 2002.

After Agway filed a motion to stay the District Court proceedings, the District Court held an evidentiary hearing in May 2002 to consider whether and to what extent the parties' dispute could be arbitrated. In July 2002, the District Court found that the parties had entered into a contract that contained a valid arbitration clause, and granted Agway's motion. *Sleeper Farms v. Agway, Inc.*, 211 F. Supp. 2d 197, 203 (D. Me. 2002). The

court referred the dispute to the arbitrator to determine, as to all parties, (1) what issues contained in the Sleepers' complaint, or raised by the Sleepers as defenses to the purchase orders, were covered by the arbitration agreement; (2) what issues, if any, were not covered by the arbitration clause and remained for the court to decide; and (3) the merits of the issues that were covered by the arbitration clause. *Sleeper Farms v. Agway, Inc.*, 211 F. Supp. 2d at 203.

The Sleepers appealed the decision to stay the litigation, but later dismissed their appeal in August 2002.

In October 2002, Agway filed a petition for reorganization under Chapter 11 of Title 11 of the United States Code in the United States Bankruptcy Court for the Northern District of New York and filed a notice of bankruptcy in the Maine litigation.

In December 2002, the District Court issued an order administratively closing the case pending resolution of the bankruptcy proceedings.

In January 2003, the Sleepers filed a proof of claim in the bankruptcy case for $28,737,845.99 (the "Claim"). On August 27, 2004, Agway moved to expunge the Sleepers' Claim. In settlement of Agway's motion to expunge the Claim, a consent order was entered on October 21, 2004 (the "Consent Order"). The Consent Order deemed the Claim a disputed Claim for purposes of the bankruptcy case and modified the automatic stay to allow for the American Arbitration Association proceeding to fully adjudicate and determine the amount of the Sleepers' Claim.

In May 2005, the parties signed a stipulation agreeing to arbitrate all issues of liability and damages. A copy of the May 2006 Stipulation is annexed hereto as App. A. In the arbitration, the Sleepers' claimed $1,780,127 in damages.

On August 23, 24 and 25, 2005, the Arbitration was held in Syracuse, New York. The parties filed post-hearing briefs and the proceeding was closed as of November 18, 2005. The Arbitration Award, dated December 16, 2005, determined that the Sleepers' were entitled to damages in the amount of $82,459.19 and reimbursement of arbitration expenses in the amount of $20,040.51. The Arbitration Award dismissed all claims against Sirois, Wiles and Smith for lack of satisfactory proof.

By motion dated January 9, 2006, Agway moved the Bankruptcy Court for an order confirming the Arbitration Award and fixing the Sleepers' claim as a general unsecured claim in an amount not to exceed $102,499.70. The Sleepers responded by filing a cross-motion and thereafter a motion for relief from the automatic stay imposed by 11 U.S.C. § 362(a) to permit them to appeal the prior order of the District Court referring the dispute to arbitration and to move to vacate the Arbitration Award.

In January 2006, the Sleepers filed both a notice of appeal of the District Court's July 2002 order and a motion to vacate the arbitration decision. Agway filed a motion to dismiss the Sleepers' complaint.

In February 2006 the District Court determined that it could not act on the Sleepers' motion to vacate, as the Sleepers had filed an appeal. The Sleepers then dismissed the appeal.

By Memorandum-Decision and Order dated May 12, 2006, the Bankruptcy Court denied Agway's motion to confirm the Arbitration Decision without prejudice and granted the Sleepers "*nunc pro tunc* relief from the injunction imposed upon confirmation of the Debtors' confirmed plan, to the extent they seek to proceed with their motion to vacate the Arbitration Decision."

On June 2, 2006, Agway moved the District Court to confirm the Arbitration Award.

In November 2006, the District Court denied the Sleepers' motion to vacate and granted Agway's motion to confirm the Arbitration Award. The Sleepers filed a timely appeal to the First Circuit. In their appeal to the Circuit Court, the Sleepers challenged the District Court's orders: (i) initially referring the dispute to arbitration and (ii) confirming the decision of the arbitrator.

By Decision and Judgment entered November 2, 2007, the First Circuit affirmed the decisions of the District Court denying the Sleepers' motion to vacate the Arbitration Award and granting Agway's Motion to Confirm the Arbitration Award. The District Court stated that:

> the Clerk is hereby directed to enter judgment in this matter in accordance with the

> December 16, 2005 Decision of the American Arbitration Association. The effect of this judgment shall ultimately be determined by the Bankruptcy Court.

Sleeper Farms v. Agway, Inc., 460 F. Supp. 2d at 188.

Following the First Circuit's decision, Agway filed a motion with the Bankruptcy Court dated January 3, 2008, for an order: (i) establishing the Sleepers' claim as an allowed general unsecured claim in the amount of $102,499.70, and (ii) approving payment of distributions in respect of such claim to counsel for the Sleepers (the "Claim Distribution Motion"). Over opposition from the Sleepers, the Bankruptcy Court granted the Claim Distribution Motion by Order dated January 31, 2008. The Bankruptcy Court's Order fixed and allowed the Sleepers' Claim as a general unsecured claim in the amount of $102,499.70. Pursuant to the Order, Agway was permitted to make payment on the allowed claim thirty days from the entry of the Order to allow the Sleepers the opportunity to seek a stay in connection with the filing of the Petition with this Court. A copy of the Bankruptcy Court's Order is annexed hereto as App. B.

The Bankruptcy Court's January 31, 2008 Order became final and non-appealable pursuant to Federal Rule of Bankruptcy Procedure 8002(a) on February 11, 2008. The Sleepers did not file a notice of appeal, timely or otherwise, with respect to the Bankruptcy Court's January 31, 2008 Order.

On or about January 31, 2008, the Sleepers filed a Motion to Recall and Stay Mandate with the First Circuit. By Order dated February 6, 2008, the First Circuit denied the Sleepers' Motion to Recall and Stay Mandate.

On March 6, 2008, in accordance with the Bankruptcy Court's January 31, 2008 Order, Agway made a catch-up distribution payment to the Sleepers by Check No. 105895 in the amount of $61,499.82. On or about March 12, 2008, the check was cashed. A copy of the correspondence and cancelled check are annexed hereto as App. C.

STATEMENT OF FACTS

Sleeper Farms, owned and operated by petitioners Vaughn and Mary Sleeper, grew seed potatoes, which they sold to Agway from 1998 through 2000. The Sleepers agreed to plant certain varieties and quantities in return for Agway's promise to buy the crop at harvest. Price terms were left open until purchase orders were signed at harvest time. The Sleepers signed and returned the purchase orders that Agway sent them and shipped the potatoes to other farmers designated by Agway. The farmers who received the Sleepers' potatoes would inspect them and report to Agway. Agway then paid the Sleepers for potatoes shipped. *Sleeper Farms v. Agway, Inc.*, 211 F. Supp. 2d at 198-99.

The Sleepers received, signed and returned eight purchase orders from 1998 through 2000. Purchase orders were usually accompanied by an enclosure

entitled "Agway Sales Contract," which contained the following arbitration provision:

> The parties to this Contract agree that the sole remedy for resolution of any and all disagreements or disputes arising under this Contract shall be through arbitration in accordance with the rules of the American Arbitration Association, Syracuse, New York. The decision and award determined though such arbitration shall be final and binding upon the buyer and seller. Judgment upon the arbitration award may be entered in any Court having jurisdiction thereof.

Sleeper Farms v. Agway, Inc., 211 F. Supp. 2d at 199. The District Court found that the parties had expressed mutual consent to the contract in accordance with the purchase orders, and that the purchase orders incorporated the Agway Sales Contract by reference, including the arbitration provision. *Sleeper Farms v.* Agway, *Inc.*, 211 F. Supp. 2d at 201-202.

Following three days of arbitration, the arbitrator found that Agway had improperly withheld $51,038.62 in violation of the Maine Potato Licensing Act ("MPLA"), 7 M.R.S.A. § 1022, and awarded that sum plus $25,004.86 in interest, for a total of $76,043.48 on the MPLA claim. *See,* Arbitration Award, pg. 6. The arbitrator found that Agway violated the Perishable Agricultural Commodities Act ("PACA"), 7 U.S.C. § 499b, by making a late payment, and awarded $1,607.90, including interest, for the PACA violation. *See,* Arbitration Award, pg. 8. Finally, the arbitrator found that Agway underpaid brokers'

commissions on three transactions and awarded the Sleepers a total of $4,807.81, including interest, on those claims. *See,* Arbitration Award, pg. 16.

As to the Sleepers' fraud and misrepresentation claims, the arbitrator found that there was insufficient evidence of either liability or damages. *See,* Arbitration Award, pg. 13-15. The arbitrator denied all of the Sleepers' breach of contract claims, due to failure of proof, except to the extent those claims had already been decided in the Sleepers' favor under the MPLA and PACA. All of the other claims of the Sleepers, including those against the individual defendants, were denied on either legal grounds or due to a failure of proof.

SUMMARY OF ARGUMENT

The Sleepers' Petition before this Court is premised entirely on the characterization of Agway's alleged self-help as a default in proceeding with arbitration under 9 U.S.C. § 3. Respondents submit that such a characterization is unsupported in fact or in law, thus presenting an insurmountable obstacle to the granting of the Petition. Accordingly, and for the several reasons articulated below, Respondents respectfully submit that the Petition should be denied.

First, the Circuit Court of Appeals for the First Circuit correctly observed that the Petitioners had not preserved their claim of "waiver" (which the Petitioners now refer to as Agway's "default"). Having failed to present or preserve the issue below, the Petitioners cannot resurrect this issue before the Supreme Court.

Additionally, (and undoubtedly due in large part to the fact that the Petitioners did not advance the argument below), none of the lower courts nor the arbitrator found Agway's alleged self-help to constitute a "default" of the arbitration clause.

Furthermore, Agway's alleged self-help, now characterized by the Petitioners as a "default", simply does not constitute a "default in proceeding with such arbitration" as described in Section 3 of the FAA.

Accordingly, even if the Court determines that the Petitioners preserved their right to advance a "self-help equals default" argument, there is no split of authority requiring the intervention of the Supreme Court with respect to either: (i) whether the issue of waiver by a party that allegedly engaged in self-help is to be decided by a court or arbitrator, or (ii) whether a party who allegedly engaged in self-help may compel arbitration.

Finally, the Petitioners' appeal is moot. This Court can offer no effective relief to the Petitioners due to the Bankruptcy Court's January 31, 2008 Order fixing the amount of the Sleepers' claim.

REASONS FOR DENYING THE PETITION

1. THE CIRCUIT COURT PROPERLY HELD THAT THE PETITIONERS' WAIVER CLAIMS WERE NOT PRESERVED ON APPEAL.

The First Circuit held, that the Petitioners' "waiver" argument was not presented to the District Court and was therefore forfeited. Footnote 3 to the First Circuit's decision states as follows:

> The Sleepers' response to Agway's motion to stay the proceedings did make a waiver argument, but it was hidden within a subsection that purports to argue that "Agway's Own Conduct Reveals That The Parties Never Intended To Make the 'Agway Sales Contract' A Basis of their Bargain." . . . In their reply brief, the Sleepers now characterize their argument as an "issue of Laches or Estoppel," but the Sleepers did not argue laches or estoppel to the district judge or even in their opening brief in this court, which alone forfeits that claim.

Sleeper Farms v. Agway, Inc., 506 F.3d 98, 103 n.3 (1st Cir. 2007).

On appeal to the First Circuit, the Sleepers pursued only two arguments regarding the unenforceability of the arbitration provision: (i) that the contract was illegal ("*void ab initio*"), and (ii) that Agway waived its right to arbitrate. The First Circuit stated "the Sleepers assume that such claims were properly for the arbitrator;

their objection here is that the wording of the district court's reference to the arbitrator did not allow the arbitrator to address those claims." *Id.* However, the Petitioners never made their waiver argument in its current form, to the arbitrator or the District Court. The Petitioners, having failed to raise their "self-help equals waiver equals default" argument, in its current form, before the arbitrator or the District Court, were correctly precluded from making the argument for the first time before the First Circuit. Accordingly, they are similarly precluded from pursuing the argument before this Court.

In 2002, the District Court heard the Petitioners' three challenges to Agway's motion to compel arbitration: (i) did the parties express their mutual assent to the purchase orders; (ii) did the purchase orders incorporate the "Agway Sales Contract" by reference; and (iii) is the arbitration provision invalid? *Sleeper Farms v. Agway, Inc.*, 211 F. Supp. 2d at 201-203.

In 2006, the District Court heard the Petitioners' three challenges to the Arbitration Award based upon: (i) Agway's alleged fraud on the arbitrator; (ii) the arbitrator's manifest disregard for the law; and (iii) the arbitrator's manifest disregard for the law in relation to the Sleepers' claims under the Maine Potato Licensing Act. *Sleeper Farms v. Agway, Inc.*, 460 F. Supp. 2d 184, 187 (D. Me. 2006).

As observed by the First Circuit, the Sleepers' Opposition to Defendants' Amended Motion to Dismiss and Motion to Stay Proceeding dated March 27, 2002

does contain something that could possibly be interpreted as a "waiver" argument but it was contained in a challenge to the entire contract's validity. The waiver argument was made in a section entitled "Agway's Own Conduct Reveals That The Parties Never Intended To Make the "Agway Sales Contract" A Basis of Their Bargain." The Sleepers' waiver argument suggests that Agway, through its course of conduct, acted inconsistently with its position that the purchase orders and sales contract governed the relationship between the parties. This was not an argument that touched on the existence of an arbitration provision or whether Agway's alleged self-help waived or forfeited rights under the provision. Rather, it was an attempted defense to the purchase orders, and as such, it goes to the validity of the contract as a whole, and was appropriately referred to arbitration. *Sleeper Farms*, 211 F. Supp. 2d at 203, *citing Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967).

In the Petitioners' brief to the First Circuit, the waiver issue is couched both in terms of delay and Agway's behavior being inconsistent with a right to arbitrate. As the First Circuit stated, the Petitioners did not preserve their argument with respect to laches or estoppel. *Sleeper Farms v. Agway, Inc.*, 506 F.3d at 103. Petitioners' Reply Brief to the First Circuit is the first instance where this argument was described in terms of laches or estoppel.

Petitioners' failed to present the waiver argument, in a coherent fashion, to the District Court in either 2002 or 2006. Therefore, Petitioners' claims of waiver were not properly preserved on appeal.

2. THE FIRST CIRCUIT CORRECTLY HELD THAT ENGAGING IN SELF-HELP IS NOT A "DEFAULT" PURSUANT TO SECTION 3 OF THE FEDERAL ARBITRATION ACT.

Even if the Petitioners are not precluded from advancing the argument before this Court, the Petitioners' argument that the First Circuit erred is based on the false premise that Agway's alleged self-help created a default for purposes of Section 3 of the FAA.

Section 3 of the FAA provides:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3 (West 2008). Petitioners argue that by the "plain language" of Section 3 of the FAA, a party in "default" cannot invoke its right to arbitrate.

Contrary to the Petitioners' argument, however, courts have repeatedly and uniformly held that engaging

in self-help is not a default in proceeding with arbitration as described in Section 3 of the FAA. Generally a breach of a contract is not a basis for waiver of an arbitration provision. *See, Local Union No. 721, United Packinghouse, Food & Allied Workers, AFL-CIO v. Needham Packing Co.*, 376 U.S. 247, 251 (1964). More specifically engaging in self-help has not been accepted as a basis for "waiver" of an arbitration provision. In *Southwest Industrial Import & Export, Inc.*, the Fifth Circuit analyzed Section 3 of the FAA in conjunction with a buyer's refusal to accept a shipment of goods and the seller's subsequent sale to another buyer as a means of self-help. *Southwest Industrial Import & Export, Inc. v. Wilmod Company, Inc.*, 524 F.2d 468, 470 (5th Cir. 1975). The court stated that contract breach or repudiation were not grounds to preclude arbitration and that the "less extreme self-help steps taken by the seller in this case fall into the same category." *Id.*

In *Welborn Clinic v. Medquist, Inc.*, the Seventh Circuit addressed self-help in a slightly different context from *Southwest*. Welborn contracted with Medquist for medical transcription services and the parties were involved in a billing dispute almost from the inception of the contractual relationship. 301 F.3d 634 (7th Cir. 2002). Medquist withheld medical records, terminated service and rejected attempts to informally resolve the dispute as required by the contract. Welborn then filed suit in federal court claiming breach of contract. Medquist responded and moved to compel arbitration. *Id.* at 636. Welborn argued that Medquist's actions constituted a waiver of an arbitration provision in the contract. The court rejected Welborn's waiver argument and stated "even strong-arm tactics like the withholding

of important medical records while demanding payment are not automatically enough to constitute an implied waiver of the agreement's arbitration provision." *Id.* at 637, *citing Southwest Industrial Import & Export, Inc. v. Wilmod Company, Inc.*, 524 F.2d at 470.

The Petitioners state that "the Court has not directly considered the effect of a default on the terms of the arbitration clause on the ability of a defaulting party to compel arbitration of a dispute." Petition pg. 3. The default the Petitioners have built their theory upon is that after including an arbitration provision in its contract with the Petitioners, ". . . Agway breached, or "defaulted" on, this clause by exercising a self-help remedy." Petition pg. 4. As demonstrated by the case law cited above, self-help is simply not a breach of or default in proceeding with an arbitration provision for purposes of 9 U.S.C. § 3.

Although the Petitioners state that the First Circuit "did not recognize the importance of the default," the First Circuit did recognize and rightly rejected the Sleepers' waiver based on self-help argument as "utterly empty." *Sleeper Farms v. Agway, Inc.*, 506 F.3d at 104.

The Petitioners' arguments are premised entirely on the faulty assertion that self-help constitutes a default under 9 U.S.C. § 3. As that proposition is unsupported in the facts of this case or the case law cited above, there exists no issue upon which there is a split of authority among the circuits and/or the state courts of last resort. Accordingly, the Petition should be denied.

3. NO SPLIT OF AUTHORITY EXISTS CONCERNING WHETHER WAIVER BY DEFAULT IS DECIDED BY THE COURT OR AN ARBITRATOR.

Even if the Petitioners' argument had not been waived below and was based on a sustainable proposition, there is no split of authority regarding whether a court or arbitrator should decide a waiver issue.

This Court has made clear, a challenge to the validity of a contract as a whole, and not specifically to the arbitration clause, must go to an arbitrator and not the court. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). In *Cardegna*, this Court outlined three propositions with respect to arbitration clauses:

> First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. *Second, unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance.* Third, this arbitration law applies in state as well as federal courts.

Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445-46 (2006) (emphasis added). The Petitioners did not challenge the validity of the arbitration clause with their "waiver" argument presented to the District Court. Instead, they attempted to limit what documents were considered to form the contract between themselves and Agway. But even if the Sleepers' assertion that "Agway's

Own Conduct Reveals That The Parties Never Intended To Make the "Agway Sales Contract" A Basis of Their Bargain" contained in their 2002 argument to the District Court was somehow interpreted as a challenge to the validity of the arbitration provision alone, the District Court heard that argument and dismissed it in accordance with Supreme Court precedent outlined above.

The Sleepers simply did not challenge the validity of the arbitration clause, and they managed to articulate a waiver argument only at the last stages of the appeal to the First Circuit. In the Petition, the Sleepers now argue that this alleged "breach" was to be addressed by the Courts. If the District Court was actually presented with this vague challenge to the arbitration provision (albeit subsumed within an overall challenge to the validity of the contract), it rejected the Sleepers' assertion that the arbitration provision was invalid and referred the matter to arbitration. The District Court instructed the arbitrator to determine:

> (1) what issues contained in Plaintiffs' Complaint, or raised by Plaintiffs as defenses to the purchase orders, are covered by the arbitration clause; (2) what issues, if any, are not covered by the clause and should remain for the Court to decide[2]; and (3) the merits of the issues that are covered by the clause.

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[2] It should be noted that by stipulation dated May 27, 2005 the parties agreed to the following:

> We the parties, Agway, Inc. et al. and Mary and Vaughn Sleeper, formerly doing business as Sleeper

(Cont'd)

Sleeper Farms v. Agway, Inc., 211 F. Supp. 2d 197, 203 (D. Me. 2002).

The Petitioners state the holding of the First Circuit that "the Sleepers' claim of breach of the arbitration clause was a substantive issue for the arbitrator." Petition pg. 12. The First Circuit stated:

> To the extent that the Sleepers claim that Agway breached the *arbitration clause* by resorting to self-help, that is (at least in form) a procedural arbitrability argument. . . .

Sleeper Farms v. Agway, Inc., 506 F.3d at 104.

As stated by this Court in *Howsam*, "procedural' questions which grow out of the dispute and bear on its final disposition are presumptively *not* for the judge, but for an arbitrator, to decide." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002), *quoting John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964). "The presumption is that the arbitrator should decide allegations of waiver, delay or a like defense to arbitrability." *Id.*, 537 U.S. at 84, *quoting Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1983) (internal quotes omitted).

(Cont'd)

> Farms, do hereby stipulate that all issues of liability and damages contained within Sleeper Farm's Complaint filed in United States District Court for the Northern District of Maine, Docket No. CV-02-35-B-S shall be determined through arbitration in this forum.

The Petitioners confuse the matter in an attempt to create an issue for the Court. The District Court reviewed and rejected the Sleepers' attempts to invalidate the *arbitration provision* on the basis that it was allegedly "unconscionable or fraudulently induced." *Sleeper Farms v. Agway, Inc.*, 211 F. Supp. 2d 197, 202-3 (D. Me. 2002). The Sleepers' other arguments that "the purchase orders were illegal, unconscionable or fraudulently induced" went to the validity of a contract as a whole and were sent to arbitration. *Id.* at 201. The District Court's decision, as affirmed by the First Circuit, is squarely within the reasoning of *Prima Paint* and *Cardegna.*

4. THERE IS NO SPLIT OF AUTHORITY AS TO WHETHER A PARTY "IN DEFAULT" ON AN ARBITRATION CLAUSE MAY COMPEL ARBITRATION.

This Court stated very clearly in *Howsam* that, "procedural' questions which grow out of the dispute and bear on its final disposition are presumptively *not* for the judge, but for an arbitrator, to decide." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. at 84, *quoting John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543, 557 (1964). "The presumption is that the arbitrator should decide allegations of waiver, delay or a like defense to arbitrability." *Id.*, 537 U.S. at 84, *quoting Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. at 24-25 (internal quotes omitted).

The Petitioners rely on *Marie v. Allied Home Mortgage Corp.* in an attempt to demonstrate conflicting authority among the circuits in interpreting *Howsam.*

Marie v. Allied Home Mortgage Corp., 402 F.3d 1 (1st Cir. 2005). In *Marie*, the First Circuit concluded that a court was the appropriate forum to hear issues with respect to an alleged waiver of arbitration rights as a result of participation in litigation. While *Marie* reviewed the relevant case law on waiver by participating in the judicial process, "judicial activity waiver" by Agway has never been raised as an issue by the Sleepers.

Moreover, the Sleepers' argue that *Marie* did not involve waiver by "litigation activity." Marie filed a charge with the EEOC and the Massachusetts Commission Against Discrimination ("MCAD") and Marie's employer, Allied, filed a response. Contrary to the Petitioners' assertion that the EEOC proceeding is not 'litigation, the *Marie* court held to the contrary: .

> The waiver here is somewhat unusual in that the claim is of litigation activity before the EEOC that is inconsistent with a right to arbitrate, as opposed to litigation before a court. But this makes no difference. Courts are still well suited to determine the sort of forum-shopping and procedural issues that are likely to arise in litigation before the EEOC. . . .

Id. at 14.

Importantly, *Marie* does not involve self-help as an alleged waiver or default of an arbitration provision. *Southwest* and *Welborn*, discussed above, held that self-help is not inconsistent with a party's intent to enforce an arbitration provision.

Petitioners also cite to *Ehleiter v. Grapetree Shores, Inc.*, which involved a defendant who litigated for nearly four years before moving to compel arbitration. *Ehleiter* clearly involves litigation activity and does not involve a "waiver" by self-help. *Ehleiter v. Grapetree Shores, Inc.*, 482, F.3d 207 (3d Cir. 2007).

The Petitioners claim that *Marie* and *Ehleiter* are in conflict with the Eighth Circuit's decision in *National American Ins. Co. v. Transamerica Occidental Life Ins. Co.*, 328 F.3d 462 (8th Cir. 2003). *Transamerica* involved a dispute between insurance companies which had been participating in an arbitration proceeding for over a year when one of the arbitrators resigned. When the plaintiff moved the court to appoint a replacement arbitrator pursuant to 9 U.S.C. § 5, Transamerica argued that the plaintiff had waived its right to arbitrate because it had "pursued litigation in the Oklahoma courts." The *Transamerica* decision provides no discussion of the waiver issue but it is clear it involves litigation activity and not a "default" via self-help. Importantly, *Transamerica* does not involve a waiver based on 9 U.S.C. § 3. *See, Ehleiter v. Grapetree Shores, Inc.*, 482, F.3d at 220.

Petitioners next cite to *Pro Tech Industries, Inc. v. URS Corp.*, in support of their argument that a split exists amongst the Circuits. Pro Tech asserted three reasons as to why it should not be compelled to arbitrate:

> (1) URS waived its right to compel arbitration; (2) URS's demand for arbitration was insufficient; and (3) the arbitration provision was unenforceable, because Pro Tech cannot now afford arbitration.

Pro Tech Industries, Inc. v. URS Corp., 377 F.3d 868, 870 (8th Cir. 2004). Citing *Howsam*, the Eighth Circuit concluded that "questions of whether waiver occurred and whether demand was sufficient and timely under the agreement" should be determined by the arbiter. *Id.* at 872. The Eighth Circuit did address the direct challenge to the arbitration provision as "unconscionable." The *Pro Tech* court, in keeping with *Buckeye,* determined that is was appropriate for a court, and not an arbiter, to hear the challenge to the arbitration provision based on unconscionability. *Pro Tech* fails to support the Petitioners' position that there is a split of authority among the Circuits on who decides issues of waiver.

Next the Petitioners claim that *Sanderson Farms, Inc. v. Gatlin* creates a split of authority this Court must address. In *Sanderson,* the plaintiffs (the Gatlins) contracted with Sanderson Farms to raise chickens. The contract contained an arbitration clause which required Sanderson Farms to split the arbitration fees with the plaintiffs. The plaintiffs filed a demand for arbitration and paid their portion of the filing fee. After Sanderson Farms refused to pay its portion of the filing fees, the plaintiffs commenced an action in the Mississippi state court. The court held that Sanderson Farms breached the arbitration provision by refusing to pay its share of the arbitration fees and costs, and were in default of proceeding with arbitration under 9 U.S.C. § 3. *Sanderson Farms, Inc. v. Gatlin*, 848 So. 2d 828, 837-838 (Miss. 2003).

In its decision, the Supreme Court of Mississippi explicitly acknowledged that self-help is not a basis for waiver of rights under an arbitration provision. *Id.* at

837 fn. 5, *citing Russell v. Performance Toyota, Inc.*, 826 So. 2d 719, 723-24 (Miss. 2002).

Whether Mississippi's Supreme Court held that a court could hear a waiver argument based on the failure of a party *to pay its share of arbitration fees* is irrelevant to the Petitioners' appeal. Moreover, the Mississippi Supreme Court has explicitly held that self-help is not a basis for a waiver of arbitration rights. The foundation of the Petitioners' argument is that self-help constitutes a default under an arbitration provision and such a default constitutes a waiver of a party's right to compel arbitration. The very case the Petitioners claim creates a conflict between the Supreme Court and highest court of a state undercuts this premise.

5. THERE IS NO SPLIT OF AUTHORITY AS TO WHETHER A PARTY WHO ENGAGES IN SELF-HELP MAY COMPEL ARBITRATION.

The Petitioners argue that the First Circuit's decision stands in contrast to *Sanderson Farms.* The First Circuit described as "utterly empty," the Sleepers' argument that by offsetting an amount allegedly due to the Sleepers (self-help), Agway was in "default" of the arbitration clause and had therefore waived its right to arbitration. "The First Circuit simply failed to see what the Mississippi Supreme Court found dispositive." Petition, pg. 17. The Sleepers claim that by engaging in self-help Agway precluded the District Court from compelling arbitration.

As stated above, *Sanderson Farms* explicitly recognized that engaging in self-help does not constitute

a waiver of a party's right to compel arbitration. *Id.* at 837 fn. 5, *citing Russell v. Performance Toyota, Inc.*, 826 So. 2d at 723-24. The Petitioners' argument is based on the false premise that self-help constitutes a default in proceeding with arbitration as contemplated in 9 U.S.C. § 3. Petitioners fail to cite to a single case which supports their proposition. The case upon which they build their argument for this Court to accept their Petition explicitly rejects their assertion that self-help results in a waiver of the right to demand arbitration.

6. PETITIONERS' APPEAL HAS BEEN RENDERED MOOT BY FINAL ORDER OF THE BANKRUPTCY COURT.

Pursuant to Article III of the United States Constitution, "[a] case must be dismissed as moot if, at some time after the institution of the action, the parties no longer have a legally cognizable stake in the outcome. This rule applies even where the case becomes moot while pending on appeal." *N.H. Motor Transp. Ass'n v. Rowe*, 448 F.3d 66 (1st Cir. 2006), *see also, Arizonans for Official English v. Ariz.*, 520 U.S. 43, 68 fn. 22 (1997) ("[m]ootness has been described as the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of litigation (standing) must continue throughout its existence (mootness)"). An issue will be rendered moot when events occur that prevent the appellate court from granting any effective relief. *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992).

The Sleepers' Petitions has been rendered moot by the Bankruptcy Court's January 31, 2008 Order (I)

Establishing Sleeper Farms' Claim Number 869 as an Allowed General Unsecured Claim in the Amount of $102,499.70, and (II) Approving Method of Payment and Delivery of Distributions in Respect of Such Claim. A copy of the Bankruptcy Court's Order is annexed hereto as App. B. The Order was entered following notice and a hearing and over the opposition of the Sleepers.

The Bankruptcy Court's January 31, 2008 Order became final and non-appealable pursuant to Federal Rule of Bankruptcy Procedure 8002(a) on February 11, 2008. The Petitioners have not filed a notice of appeal, timely or otherwise, with respect to the Bankruptcy Court's January 31, 2008 Order.

A final order allowing or disallowing a proof of claim is *res judicata* with respect to the Sleepers' claims. As this Court stated in *Federated Dep't Stores, Inc.*, under the doctrine of *res judicata*:

> A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in the action.

Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981). The doctrine bars subsequent litigation if an earlier judgment was: (1) a final judgment on the merits, (2) by a court of competent jurisdiction, (3) the case involved the same parties, and (4) involving the same cause of action. *EDP Medical Computer Systems, Inc. v. United States*, 480 F.3d 621, 624 (2d Cir. 2007), *quoting In re Teltronics Servs., Inc.*, 762 F.2d 185, 190 (2d Cir. 1985).

Several of the Circuits have even held that the allowance an *uncontested* proof of claim is a 'final judgment' for *res judicata* purposes. *Id.* at 625; *Bank of Lafayette v. Baudoin (In re Baudoin)*, 981 F.2d 736, 740 (5th Cir. 1993); *Siegel v. Fed. Home Loan Mtge. Corp.*, 143 F.3d 525, 528-31 (9th Cir. 1998). There is no dispute that the Sleepers' claim was highly contested and the subject of several motions before the Bankruptcy Court. The Sleepers' claim was originally objected to by motion dated August 27, 2004 and the Sleepers opposed Agway's attempt to disallow the claim. Following the issuance of the Arbitration Award in 2005, Agway unsuccessfully moved to confirm the Arbitration Award in the Bankruptcy Court. The Bankruptcy Court determined the District Court was the appropriate forum in which to seek confirmation of the award. Following confirmation of the Arbitration Award by the District Court, and affirmance of the District Court decision by the First Circuit, Agway again moved to fix the amount of the Sleepers' claim in Bankruptcy Court. The Sleepers objected to the motion but were overruled. The Sleepers did not appeal the Bankruptcy Court Order. Accordingly, and pursuant to the Bankruptcy Court Order, Agway established the Sleepers' claim in the amount set forth in the Arbitration Award.

The Bankruptcy Court's Order fixing the Sleepers' claim is the equivalent of a final judgment on the merits. *EDP Medical Computer Systems, Inc.* at 625, *citing Orsini Santos v. Mender*, 349 B.R. 762, 768 (1st Cir. B.A.P. 2006), *citing In re Perry*, 391 F.3d 282, 285 (1st Cir. 2004).

The Bankruptcy Court has core jurisdiction over the determination of claims pursuant to 28 U.S.C. § 157(b)(2)(B) which provides as follows:

> Core proceedings include, but are not limited to — allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests. . . .

See, 28 U.S.C. § 157(b)(2)(B) (West 2008). Clearly the second part of the *res judicata* analysis has been met.

The third and forth parts of the analysis are undisputed. Both Agway and the Sleepers were parties to the arbitration and the claims allowance process. The claims adjudication process was directly related to, and based upon, the underlying litigation that was subject to the Arbitration Award.

When a bankruptcy court order is *res judicata* and prevents a court from providing the relief sought by the appellant, the appeal is moot. Where a bankruptcy court order from a case filed in 2004 conclusively resolved the issues being appealed, *res judicata* barred the court from considering an appeal of a decision of the bankruptcy court in a bankruptcy proceeding commenced by the same debtor in 2005. *See, In re High Voltage Engineering Corp.*, 379 B.R. 399, 402 (D. Mass. 2007), *citing Allen v. McCurry*, 449 U.S. 90, 94 (1980).

As a result of the *res judicata* effect of the Bankruptcy Court's order fixing the amount and treatment of Sleepers' claim, it is respectfully submitted

that this Court cannot grant any effective relief to the Petitioners. Even if the Court were to overturn the First Circuit Decision and the First Circuit remanded to the District Court to hear the Sleepers' waiver arguments, the District Court can provide no relief. Regardless of whether the District Court determines that there should have been an arbitration proceeding or that the Sleepers' claim should have been determined in District Court, the amount and treatment of the Sleepers' claim against Agway has been fixed by a final non-appealable order of the Bankruptcy Court.

CONCLUSION

For all of the foregoing reasons, Agway respectfully requests that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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